

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 23.01.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.220 of 1997

1.S.Kalyanasundaram @

Sundara Gounder,

2.S.Muthuswami

.. Appellants/Appellants/Plaintiff
vs.

C.K.Arunachalam

.. Respondent/Respondent/Defendant

Prayer: This second appeal under Section 100 of CPC has been filed against the decree and judgment, dated 22.08.1996 in A.S.No.2 of 1995 passed by the Principal District Judge, Periyar District, Erode, modifying the order passed by the District Munsif Court, Erode, dated 4.2.1993, in O.S.No.1385 of 1992.

For Appellant : Mr.M.Sundresh

For Respondent : Mr.A.K.Kumarasamy

JUDGMENT

This second appeal has been preferred against the decree and judgment in A.S.No.2/1995 on the file of the Court of the Principal District Judge, Erode. The plaintiff, who has lost his case before both the court below, is the appellant herein.

2. The averments in the plaint relevant for the purpose of deciding this appeal are as follows:-

2(a) The suit is for declaration of the plaintiffs' easementary right to use the suit cart track for taking carts, lorries, men etc., from their land in resurvey No.306/4 and from the road in the south to their lands in resurvey No.307 of Pudur village and morefully set out in the schedule hereunder and shown in the red colour in the plaint plan and for consequential permanent injunction. The plaintiffs are brothers. They are owners of a portion of old S.F.No.288 of Pudur village and the land is called "Valliampallam". The total extent of Valliampallam land is 10.37 acres. The plaintiffs' paternal grand mother was entitled

to a half share in the said survey number 288 to an extent of 5.18 ½ acres. On 04.10.1954 the plaintiffs' grand mother Velayammal executed a Will while in a sound disposing state of mind bequeating her 5.18 ½ acres to the plaintiffs herein. The Will was also duly registered as document No.47 of 1954. The said Velayammal died in or about the year 1965. The plaintiffs became entitled to the said 5.18 ½ acres.

2(b) The defendant is the son of Kaliappa Gounder. The said Kaliappa Gounder filed a suit in O.S.No.430 of 1959 on the file of this Court for declaring his right to his specific portion in the lands and S.F.No.288 was the first item. He also claimed the relief of injunction. He had filed a plan with the suit. The certified copy of plaint with plan in O.S.No.430 of 1959 on the file of this Court, is also filed. The said suit was decreed and the appeal was dismissed.

2(c) The said Kaliappa Gounder had pleaded a prior oral partition in which he contended inter alia that he was entitled to the portions marked in red in the plan. He had also mentioned therein the portions in possession of the plaintiffs' grand mother Velayammal. There is an East West road leading from Vellalapalayam to Chettipalayam which was previously an iteri and has become full fledged road. The plaintiffs' grand mother was in possession and enjoyment of the land. She had been reaching her lands in the North, through North South cart track from the road on the South. The said cart track is above 15 feet broad and has been used by the said Velayammal from time immemorial. In 1959 the said Velayammal was having a chalai which has been removed and it is now vacant land. The said Velayammal was having lands East of the said Kaliappa Gounder's land. The said Velayammal has been reaching her chalai and lands from her land on the East through the road on the South and along 15 feet cart track mentioned above. The said 15 feet North South cart track is the subject matter of this Suit. The suit cart track is marked in red colour in the plaint plan which may be treated as part and parcel of this plaint.

2(d) There has been resurvey and the land of the plaintiffs which originally belonged to the said Velayammal bearing S.F.No.306/4 and 307 of Pudur Village. The survey numbers are also indicated in the plan enclosed herewith. The suit cart track runs at the western end of old S.F.No.288. After resurvey it is in resurvey number 306/3. It has been allotted to the defendant herein in their family partition.

2(e) The plaintiffs state that they are entitled to use the cart track as an easement of necessity. The plaintiffs have no other access to reach their lands in resurvey number 307 from the road in the South and their land bearing 306/4. There was unity of ownership of the entire lands and the plaintiffs land cannot be enjoyed except through the suit cart tract. The plaintiffs are also entitled to use the suit cart track as an easement by prescription Velayammal and subsequent to her death the plaintiffs

have been using the said cart track for reaching their land in old S.F.No.288 resurvey number 307 from resurvey number 306/4 (old S.F.No.288) and from road in the South as of right, without interruption for more than 50 years. By such long use as of right and without interruption the plaintiffs have acquired a right by adverse possession.

2(f) The plaintiffs and defendant have jointly put up a small tub like construction of about 2 feet broad in the middle of western end of the cart track. The said tub was put up for cattle taking water. The said tub is not an interruption to the user of the cart track. If the suit cart track is obliterated it will cause great hardship to the plaintiffs. The defendant is a powerful men having lot of local influence. On 14.10.1992 he attempted to obliterate the suit cart track. The plaintiffs prevented the same with great difficulty. Since the defendant's conduct tends to create a cloud on the rights of the plaintiffs, the plaintiffs are filing the present suit for declaration of their easementary right in the suit cart track and for a permanent injunction restraining them from interfering with the plaintiffs' use of the cart track.

3. 3(a) The defendant has filed written statement contending that the plaintiffs are not the owners of the portion of old S.F.No.288 of Pudur Village. The total extend of Valliampalam is 10.37 acres. It is incorrect to say that the plaintiffs' paternal grand mother was entitled to half share in the said survey number 288 namely an extent of 5.18 ½ acres. It is false to say that on 04.10.1954 the plaintiff's grand mother Velayammal executed a Will while in sound disposing state of mind bequeathing her 5.18 ½ acres to the plaintiffs. It is not correct to say that the Will was also duly registered as document No.47/1984. It is incorrect to say that the said Vellayammal died in or about the year 1965. It is false to say that the plaintiffs become entitled to the said 5.18 ½ acres. It is true that the defendant is the son of one Kaliappa Gounder. It is true that Kaliappa Gounder filed a suit in O.S.No.430/1959 on the file of this Court for declaring hi right to his specific portion in the lands and S.F.No.288 was the first item. It is true that he also claimed the relief of injunction. It is true that he had filed a plan with the suit. It is incorrect to say that the certified copy of the plaint with plan in O.S.No.430/1959 on the file of this Court is filed. It is true that the suit was decreed and the appeal was dismissed.

3(b) It is true that the said Kaliappa Gounder had pleaded a prior oral partition in which he inter alia that he was entitled to the portions marked in red in the plan. It is false to say that he had also mentioned therein the portion in possession of the plaintiff's grand mother Velyammal. It is false to say that there is an East West road leading Vellalapalayam to Chettipalayam which was previously itteri and has become full fledged road. It is false to say that the plaintiffs' grand mother was in possession and enjoyment of her lands. It is utter false to say that she had

been reaching her lands in the North, through North South cart track from the road on the South. It is false to say that the said cart track is about 15 feet broad and has been used by the said Velayammal from time immemorial.

3(c) It is false to say that in 1959 the said Velayammal was having a salai which has been removed and it is now vacant land. It is false to say that the said Velayammal was having lands East of the said Kaliappa Gounder's land. It is false to say that the said Velayammal has been reaching her chalai and lands from her lands on the East through the road on the South and along 15 feet cart track mentioned above. It is incorrect to say that the said 15 feet North South cart track is the subject matter of this suit. It is incorrect to say that the suit cart track is marked in red colour in the plaint plan which may be treated as part and parcel of this plaint. It is false to say that there has been resurvey and the land of the plaintiffs which was originally belonged to the said Velayammal bearing S.F.No.306/4 and 307 of Pudur Village. It is false to say that the suit cart track runs at the western end of old S.F.No.288. It is incorrect to say that after resurvey it is in resurvey number 306/3. It is false to say that it has been allotted to the defendant in their family partition. It is false to say that the plaintiffs have no other access to reach their lands in resurvey No.307 from the road in the South and their land bearing survey No.306/4.

3(d) It is false to say that there was unity of ownership of the entire lands and the plaintiffs' land cannot be enjoyed except through the suit cart track. The plaintiffs have not entitled to use the said cart track under the law of prescription. They have not in possession of the cart track without interruption for more than 50 years as alleged in the plaint. The plaintiffs and the defendant have not jointly put up any small tub like construction of about 2 feet width in the middle of Western end of the cart track for the purpose of cattle taking water. There is no enmity between the plaintiffs and defendant. The defendant is not a powerful man having lot of local influence. The plaintiffs cannot claim any right over the cart track. The land in R.S.No.306/3 is absolutely belonged to the defendant. Even the Commissioner who visited the suit property did not find any cart track in this defendant's lands. On the other hand he found well grown Maize crops which was more than 10 days old in the entire R.S.No.306/3. Before the first visit of the commissioner, the plaintiffs succeeded in pulling tyre cart by hand from South to North across this respondent's field. By such unlawful and high handed act of the plaintiffs two parallel tyre marks marked as "ஆ இ" were found in the defendant's land by the Commissioner. The crops were crushed when the wheels passed along with the field. This is a clear proof positive of the fact that there was no existence of any cart track.

3(e) This defendant has not made any attempt to demolish the cart track. The path way shown in the plan in O.S.No.430/1959 was used by this defendant's father for his own necessity and same was ploughed and crops were raised several years ago. The plaintiffs had not objected for it at that time because they have no right interest thereon. The plaintiffs have clearly stated in the plaint as well as affidavit in I.A.No.1772/1992 that a cart track was in existence with an ulterior motive to form a new cart track after obtaining exparte injunction in I.A.No.1772/1992 by suppressing the truth and suggesting the false hood but fortunately this defendant was able to sow Maize and the Commissioner who had visited the property on 16.10.1992 has found 10 days old Maize crops in this defendant's land. If it is so on 15.10.1992 there could not have been the suit cart track in existence. The plaintiffs are not come to this Court with clean hands. On this ground alone the suit is liable to be dismissed.

3(f) The plaintiffs have to establish the enjoyment of cart track for a period of twenty years and should also establish such user also made within 20 years. Prior to the date of institution of the suit when there is no cart track is in existence as alleged by the plaintiffs on the ground this question of enjoyment does not arise. Therefore the question of easement of prescription does not arise in this case and the question of easement of necessity does not arise because the plaintiffs have access to their fields from the North and East. The plaintiffs did not disclose how they got title in S.F.No.288. Hence the suit is liable to be dismissed.

4. After going through the pleadings of the parties, the learned trial Judge framed two issues. On the side of the plaintiffs P.W.1 & P.W.2 were examined and Exs.A.1 to A.8 were marked. On the side of the defendants, D.W.1 & D.W.2 were examined and Ex.B.1 to B.11 were marked. On the basis of the evidence available on record, the learned trial Court has dismissed the suit. Aggrieved by the findings of the learned Trial Judge, the plaintiff preferred an appeal in A.S.No.2/1995 before the Principal District Judge, Erode, who has also confirmed the judgment of the trial Court thereby dismissing the suit. Hence the plaintiffs have preferred this second appeal.

5. The substantial question of law involved in this second appeal is whether there is erroneous appreciation of the courts below and further to take note of admission which necessitated the judgment of the Court below?

6.The point:-

6(a) The only point to be decided in this appeal is whether there was any cart track in S.No.306/3 which belongs to the defendant leading to resurvey No.306/4 (Old survey No.288) belonging to the plaintiffs where his house is situated. There are

two Commissioner's report and plaint available in this case. In Ex.C.1-report, the commissioner has shown the existence of a cart track shown in green colour in Ex.C.2. But the same Commissioner, on the objection by the defendant against Ex.C.1-report and Ex.C.2-plan, has visited once again on 21.11.1992 and filed Ex.C.3-report and Ex.C.4-plan. In Ex.C.3-report the Commissioner has clearly stated that there was no cart track in the defendant's resurvey No.306/3. He has stated in Ex.C.3-report that there is a path way on the East of defendant's property which leads to the plaintiffs' property. The said path way has been shown as ७1. ७2. ७4. ७5. ७7. ७8. in red dotted lines. The Commissioner has clearly stated that neither cart track nor wheel mark seen during his second visit in the defendant's property. First visit of the Commissioner was on 16.10.1992 and the second visit of the Commissioner to the suit property was on 21.11.1992. If a cart track of a long duration is in existence in the defendant's land as shown in Ex.C.1-plan then there is no possibility for disappearance of the said cart track within a month i.e. duration of the first visit of the commissioner and the second visit of the commissioner.

6(b) The learned counsel appearing for the respondents focussed the attention of this Court to the earlier suit filed by the defendant's father before the District Munsif, Erode, in O.S.No.430/1959. Ex.B.3 is the plan filed in O.S.No.430/1959. A B C D is the land mark in the plan to the plaint schedule property. There is no path way shown in the old Survey No.2 in Ex.B.3-plan, which is admittedly the land of the plaintiff's herein. If there was any path way in existence in the defendant's property that would have been shown in the defendant's property leading to the plaintiff's property in old S.No.288. Admittedly the plaintiffs' property are North of the defendant's property. Even the North of the property shown in S.No.288 under Ex.B.3 there is no cart track shown. P.W.1 in his evidence in the cross-examination has admitted that his father has filed the said suit in O.S.No.858/84 against the brothers of the present defendant and Ex.A.8 is the copy of the written statement filed by the defendant in that suit. The present defendant is the sixth defendant in that suit. P.W.1 would depose that there is no other path way nearby at all. Only under that ground he claimed easementary right in respect of the cart track shown in the defendant's property wherein actually there is no cart track as per Ex.C.4-plan. P.W.1 would admit that Ex.B.4 the plan filed by them in O.S.NO.858/1984 filed by the plaintiff's father against the defendant herein. P.W.1 has further admitted that in Ex.B.4-plan in O.S.No.858/1984 have not mentioned anything about the existence of the cart track in the suit land. He has further admitted that in Ex.A.8, the panchayet road has been mentioned at para 4 which has been shown by the Commissioner in Ex.C.4-plan in this suit. The non mentioning of the existence of a cart track in the suit property in the earlier suit i.e., O.S.No.858/1984 filed by the plaintiff's father itself will go to show that there was no

existence of cart track as claimed by the plaintiff. The defendant has specifically stated in the written statement and in his evidence that the cart track shown in Ex.C.2 was created by the plaintiffs only for the purpose of this case and that is why it was not shown in Ex.B.4-plan because it was not in existence during the second visit of the Commissioner to the suit property. The plaintiffs have not pleaded that subsequent to the first visit of the Commissioner, the defendants have destroyed the cart track. Under such circumstances, I do not find any reason to interfere with the well considered judgment of the Court below. I do not find any illegality or infirmity in the judgment of the first appellate Court in A.S.No.2/1995 on the file of the Court of Principal District Judge, Erode, which does not warrant any interference from this Court. Point is answered accordingly.

7. In the result, the appeal is dismissed confirming the decree and judgment in A.S.No.2/1995 on the file of the Court of Principal District Judge, Erode, with costs throughout.
Ssv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,
1.The Principal District Judge,
Periyar District, Erode.
2.The District Munsif, Erode.

+ one cc to Mr. M.N. Sundresh, Advocate sr no. 4556
+ one cc to Mr. A.K. Kumarasamy, Advocate sr no. 4397

BV(CO)
NM(17.03.07)

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